

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

916 WRIT PETITION NO.12070 OF 2021

ARUN GOPINATH KULKARNI AND ANOTHER
VERSUS
SATISH SHRIRAM KULKARNI

Advocate for Petitioners : Mr. Ubale Mahesh B.
Mr. Kasar Rajendra Sudam, Advocate for Respondent.

CORAM : PRITHVIRAJ K. CHAVAN, J.
DATE : 1st April, 2022.

PER COURT :-

1. Heard learned Counsel for the petitioners and for respondent.
2. In a suit for recovery of money, the petitioners, who are the original plaintiffs, moved an application under Order 1 Rule 10 and Order 6 Rule 17 of Code of Civil Procedure, on 16th February, 2021.
3. Before moving an application dated 16th February, 2021, the petitioner had already moved an application on 21st November, 2019 under Order 38 Rule 5 of CPC. Despite having knowledge of the application moved by the petitioner under Order 38 Rule 5 of CPC, the respondent (original defendant) filed his say almost after more than one year on 8th February, 2021. The respondent had meanwhile sold the property sought to be attached by the petitioners on 5th

June, 2020, thereby rendering the application of the petitioners under Order 38 Rule 5 of CPC, infructuous.

4. The learned Trial Judge, without giving an opportunity of being heard to the petitioner on his application under Order 38 Rule 5 of CPC, passed certain remarks and observed as regards the application under Order 38 Rule 5 of CPC. The learned Trial Judge ought to have restricted the order under Order 1 Rule 10 and under Order 6 Rule 17 of CPC instead of going into the merits of the application under Order 38 Rule 5 of CPC. The learned Civil Judge, Senior Division, Ahmednagar has, therefore, committed a grave error in law by passing such an illegal order.

5. In the impugned order it has been observed that in the application seeking attachment before judgment under Order 38 Rule 5 of CPC, the petitioner had no where pleaded that the defendant with intent to obstruct or delay execution of any decree, that may be passed against him, (a) is about to dispose of the property or any part of his property etc. etc. Without going into merits of the application under Order 38 Rule 5 of CPC, which the trial Court shall decide independently by properly considering the recitals therein, in the impugned order the learned Trial

(3)

Court ought to have allowed the application of the petitioner under Order 1 Rule 10 and under Order 6 Rule 17 of CPC. The reasons for refusing the prayer are incorrect and improper. The findings arrived at are in ignorance of the settled principles of law.

6. As such, the impugned order, refusing permission under Order 1 Rule 10 of CPC as well as Order 6 Rule 17 of CPC is set aside.

7. The petitioner shall take steps to implead the proposed defendant – Vijay Balasaheb Kale in the cause title of the plaint. Necessary amendment shall be carried out within fifteen days from today.

8. The learned Civil Judge, Senior Division, Ahmednagar shall independently decide the application dated 21st November, 2019 under Order 38 Rule 5 of CPC preferred by the petitioner after giving due opportunities to the respective parties.

9. The petition stands disposed off in the aforesaid terms with no order as to costs.

(PRITHVIRAJ K. CHAVAN, J.)